IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.992 OF 2001

Pappu @ Govind Lallu Baijanathsingh
Convict No.C-11905
Yeravada Central Prison,
Pune-6 ..Appellant (Ori.Accused)

Vs.

The State of Maharashtra
(Aarey Police Station,
Goregaon) ..Respondent

....

Mr.Shiv Motariya Advocate (appointed) for Appellant
Mr.A.M.Shringarpure A.P.P. for State

....

CORAM: N.V.DABHOLKAR AND SMT.V.K.TAHILRAMANI,JJ.

DATE : FEBRUARY 22, 2006

ORAL JUDGMENT (PER TAHILRAMANI,J.):

1. Through this appeal, the appellant i.e. original accused challenges the judgment and order dated 14th March, 2001 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 666 of 1997. By the said judgment and order, the learned Judge convicted and

sentenced the appellant under Sections 363, 366A and 376(2)(f) of IPC. For the offence punishable under Sections 363, 366A and 376(2)(f) of IPC, the appellant was sentenced to suffer R.I. for seven years, ten years and life imprisonment respectively. The appellant was also sentenced to pay fine of Rs.10,000/-, in default, R.I. for two years. The learned Judge directed that the substantive sentences of imprisonment should run concurrently.

2. The prosecution case briefly stated is as under:

. Complainant Sushila Goyal (P.W.1) was residing with her husband and children at Ganesh Nagar, Aarey Colony, Goregaon, Bombay. Sapna (P.W.3) victim girl, is the daughter of Sushila (P.W.1). Accused was residing in the same locality as that of the complainant. On 9th March, 1997 in the evening complainant fed her three minor children and made them sleep in the house. Thereafter, she and her husband left the house for work. When Sushila and her husband came back, she went to cover her three minor children with bed-sheet, at

that time, she found that her daughter Sapna aged 3 years, was not there. Sushila felt that her daughter Sapna had gone for attending the call of nature. She went out in search of her daughter. At about 11.30 p.m., P.W.2 Ramfer Yadav who had gone for latrine, heard one child crying. Sushila made enquiry with Ramfer Yadav and he informed her that one child was standing nearby and crying and he asked her to see whether the child was her daughter. Sushila and others rushed to the place and saw that it was her child Sapna who was crying. Sapna told her mother Sushila that "Pappu Mama Uthake Leke Gaya". Sushila asked Sapna as to what had happened. Sapna further told that "Pappu Mama did something at her private part" and she pointed out her private part. Thereafter, they went to Aarey Police Station. Sushila's statement (Exhibit-6) came to be recorded. Sushila's daughter Sapna was admitted to Cooper hospital, Sapna remained in hospital for a number of days. At the time of admission, P.W.9 Dr.Priti Jadhav examined the victim girl. On examining victim girl, Dr.Jadhav found "bite mark on the lower lip + Dried blood stain marks seen on both medial part of thighs." On vaginal examination, Dr.Jadhav found

"posterior part of the hymen bruised-

. 2nd degree perianal tear with partial laceration of external fibres of external anal sphincter."

. In the opinion of P.W.9 Dr.Jadhav, the type of injury mentioned by her in the medical report, can be caused by sexual intercourse. After completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the appellant under Section 363, 366A and 376(2)(f) of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellant as stated in para no.1 above. Hence, this appeal.

4. We have heard Mr.Motariya, the learned advocate for the appellant and Mr.Shringarpure, the learned A.P.P. for the State. We have also perused the

evidence in this case as well as judgment and order passed by the learned Sessions Judge. After carefully considering the matter, we are of the opinion that the conviction of the appellant under Sections 363 and 376(2)(f) of IPC, deserves to be maintained.

5. The conviction of the appellant is mainly founded on the evidence of P.W.3 Sapna i.e. victim girl. The evidence of the victim girl is corroborated by that of the complainant-P.W.1 Sushila as well as the medical evidence.

6. The victim girl has stated that the accused was known to her since prior to the incident. She has stated that when she was sleeping, "Pappu Mama" took her away. She has stated that Pappu Mama (appellant) took her to the jungle. He bit her on her lip, due to this, her lip started bleeding. Thereafter, Pappu Mama removed her nicker and did something to the place from where she urinated. Due to this, she started bleeding. Thereafter, Pappu Mama left her in the jungle and ran away. She stood there and she was crying. Somebody came there for the purpose of going to toilet and told

her parents. Thereafter, her parents came there and took her home. Thereafter, she was admitted in Cooper hospital. She has further stated that she was wearing red frock (Article No.1). She has identified the said frock and she has also identified the accused person. We have carefully perused the cross-examination of this witness and we find that this witness stood by her deposition in her examination-in-chief. Nothing has been elicited in the cross-examination of the victim girl so as to disbelieve her testimony.

7. Mr.Motariya contended that appellant has been falsely roped in this case and in support of this contention, he has pointed out that though the incident took place on 9.3.1997, the statement of victim girl came to be recorded on 14.3.1997. He has submitted that this delay in recording the statement of the victim girl clearly shows that applicant has been implicated as an after thought. It is true that statement of the victim girl was recorded on 14.3.1997. However, it is seen that the victim girl who was then just three years old, was admitted in Cooper Hospital on account of extensive injuries that she had suffered at the

hands of accused. She was admitted in the hospital and was there upto 14.3.1997. Looking to the fact that she was child of three years and she had undergone extensive trauma both physical and mental, moreover, she was admitted in hospital on account of the serious injuries that she had suffered, we do not find much fault with the Investigating Officer for not recording her statement immediately after the incident. In fact, the Investigating Officer P.W.11 Anwar Pathan, Assistant Commissioner, has stated that when he went to the hospital, he found that the victim girl was not in a position to talk. Thereafter he kept daily check on the health of girl and only on 14.3.1997, he recorded her statement. Moreover, it is to be borne in mind that immediately after the incident, Sushila who is mother of the victim girl went to the police station and lodged her complaint on 10.3.1997 at 1.30 a.m. Looking to the fact that the victim girl was located at 11.30 p.m. on 9.3.1997, we find that Sushila's complaint has been promptly lodged at the police station. In the said complaint, the name of the accused has been mentioned as the person who had lifted her daughter, taken her away and thereafter raped her.

In such circumstances even if the statement of the victim girl was recorded after a few days, we feel that it would not create any dent in the prosecution case.

8. The evidence of the victim girl is corroborated to a large extent by her mother i.e. P.W.1 Sushila. Sushila is also complainant in the present case. Sushila has stated that on 9.3.1997 she and her husband had gone for work. When they came back home, they found that their daughter Sapna was not in the house. She felt that her daughter had gone to attend the call of nature. Thereafter, they went out in search of her daughter. They searched for a long time. At around 11.30 p.m. Sapna was seen crying by P.W.2 Ramfer Yadav who had gone for the purpose of latrine. Ramfer Yadav told them that one child was standing there and crying; and he asked them to see whether the child was her daughter. She and her husband rushed to the place and saw that it was her daughter who was crying. On enquiry Sapna told them that when she was sleeping, "Pappu Mama" took her away and did something to the place from where she urinated. Due to this, she started bleeding.

Thereafter, Pappu Mama left her and ran away. The evidence of the victim girl as well as complainant Sushila in relation to the fact that the victim girl was seen crying on the road and P.W.2 Ramfer Yadhav informed Sushila that he saw one child crying on the road and she should see whether it is her daughter, is borne out from the evidence of P.W.2 Ramfer Yadav.

9. Mr.Motariya contended that the appellant has been falsely implicated because P.W.2 Ramfer Yadav who has seen the victim girl crying on the road at 11.30 p.m. does not mention about any blood stains on the body or clothes of the victim girl. He has submitted that if really there were blood stains on the body and clothes of the victim girl P.W.2 Ramfer would have mentioned about the same. Non-mentioning of any such circumstance by P.W.2 Ramfer shows that the prosecution case is a false one. As far as this submission is concerned, it is to be noted that P.W.2 Ramfer saw the victim girl crying on the road at 11.30 p.m. Thus, it was night time. Moreover, the area was near the jungle. P.W.2 Ramfer has not observed the victim girl very minutely especially as he had no reason

to suspect anything. Thus, even if P.W.2 Ramfer has not stated about seeing any blood stains on the body or clothes of the victim girl, in our opinion, it would not affect the prosecution case.

10. The evidence of the victim girl is corroborated by the medical evidence. On examining victim girl, P.W.9 Dr.Jadhav found "bite mark on the lower lip + Dried blood stain marks seen on both medial part of thighs." On vaginal examination, Dr.Jadhav found "posterior part of the hymen bruised-

. 2nd degree perineal tear with partial laceration of external fibres of external and sphincter."

. In the opinion of Dr.Jadhav, the type of injury mentioned by her in the medical report, can be caused by sexual intercourse. The case papers pertaining to examination and treatment of victim girl are at Exhibit-24. Thus, the medical evidence supports the evidence of the victim girl.

11. Mr.Motariya has submitted that the complainant

Sushila falsely implicated the appellant as the complainant had purchased a house from the father of appellant for Rs.5,000/-. The father of appellant demanded the purchase price of the house, whereupon, the complainant refused to pay the same hence, relations between complainant and her family and that of the appellant and his family, were strained. It is on account of this strained relations that accused has been falsely implicated. Mr.Motariya further submitted that the injuries were caused to the victim girl while she was running and she fell down on hard and blunt substance. He has pointed out that P.W.9 Dr.Jadhav admitted that if the girl runs and falls down on hard and blunt substance, she may get perineum tear on anus. As far as these submissions are concerned, we have noticed that nowhere in his statement under Section 313 of Cr.P.C. has the appellant taken any such stand. Thus it is not the case of the appellant that on account of strained relations on account of giving money by the complainant to the appellant’s father, the appellant has been falsely implicated by the complainant. As far as the second submission is concerned that the injuries were caused due to fall

and not due to the act of the accused, it is seen that this submission is only restricted to the injuries to the anus. There is not even a whisper of a suggestion in relation to the injuries on the vagina of the victim girl. Moreover, looking to the structure of the human body, we find that it would not be possible for a child to get an injury only in the anal region on account of fall. Looking to the structure of the human body, if a person has a fall, there would be some injuries to the buttock of the person and not just to the anal region. In the present case, no injury has been sustained on her buttock. Thus, we find that defence taken in the cross-examination is half-hearted and by way of an after thought.

12. Besides the above evidence, there is one other circumstance which goes against the accused. The clothes of the accused and the victim girl were seized under panchnama. They were sent to the Chemical Analyser. The C.A. report shows that frock (Article No.1) of the victim girl was stained with human blood. The pant of the accused was found to have semen of 'O' group i.e. group of the accused. Moreover, on physical examination of the

accused by Dr.Shridhar Patil (P.W.8), ‘smegma’ was found absent. In our view, these circumstances also corroborate the prosecution case.

13. Mr.Motariya submitted that vaginal swab was taken from the victim girl, however, no semen was found therein. This shows that there was no sexual inter course or rape. No doubt, the evidence on record shows that no semen was found in the vaginal swab taken from the victim girl. In our opinion, it is not necessary that semen should be found to arrive at a positive finding that there was penetration. We have already reproduced the injuries found on the victim girl. As far as vaginal area was concerned, only bruising was found on the posterior aspect. However, the major injuries are found on the anal region. A partial laceration of external anal sphincter was noticed by Dr.Jadhav (P.W.9) so also other injuries in this area were noticed by Doctor Jadhav. From this, it appears that besides indulging in rape, the accused also had anal intercourse with the victim girl. The Doctor has only taken swabs from vagina and no swabs were taken from the anal area of the girl. Had swabs been taken from the said area, we feel

that it would have tested positive as far as semen is concerned. No doubt, charge under Section 377 of IPC has not been framed against the appellant. Hence, at this stage, we cannot record any conviction under the said section. However, we may say that the prosecution as well as the learned Sessions Judge who conducted the matter, have not applied their minds to the case specially in relation to the medical aspect of this case. Though the medical papers clearly show injuries to the anus and anal region and make out a case under Section 377 of the IPC, no charge has been framed under the said section against the appellant.

14. Looking to the evidence of the victim girl, Complainant P.W.1 Sapna and medical evidence on record, we are of the opinion that there is sufficient evidence which shows that the accused has committed offence under Sections 363 and 376(2)(f) of IPC. However, as far as Section 366A of the IPC is concerned, we are unable to confirm the said conviction. Section 366A of IPC reads thus:

. "**366A. Procuration of minor girl,--** Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

. The major ingredient as required under Section 366A of IPC, is that a person has to "induce" a minor girl to go from any place. It is the prosecution case as well as the evidence of victim girl and her mother P.W.1 Sushila that the victim girl was sleeping in her house, the appellant came there and picked her up and took her away and thereafter, he raped her. In such case, there is no question of any "inducement" to the victim girl. In this view of the matter, the conviction under Section 366A of IPC, would have to be set aside.

15. In the result, the appeal is partly allowed. The judgment and order of conviction of sentence dated 14th March, 2001 for the offence under Section 366-A of the IPC recorded by the learned Addl.Sessions Judge, Greater Mumbai in Sessions Case No. 666 of 1997 is quashed and set aside.

However, the judgment and order of conviction and sentence for the offence under Sections 363 and 376(2)(f) of IPC is confirmed. The appellant-accused is in jail. He shall serve out the sentence.

. Registrar (Judicial) shall ensure supply of certified copy of this judgment, free of costs, to the appellant through prison authorities.

. With the conclusion of appeal assignment of Advocate Mr.Motariya comes to an end, we quantify his professional charges at Rs.2500/-.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]